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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-1513

CON F. SHEA, individually and as Executive Director of the DEPARTMENT OF SOCIAL SERVICES, STATE OF COLORADO; CHARLINE J. BIRKINS, individually and as Director of the COLORADO STATE DIVISION OF PUBLIC WELFARE; KEITH D. MCBURNEY, ERNEST J. BLOEDORN, MANUEL DIAZ, JOHN L. HALEY, JAMES A. HENDERSON, M.D., GAIL F. OUREN, HENRY J. TUPPER, WILLIE E ANTHONY, JAMES H. VINCENT, individually and as constituting the COLORADO STATE BOARD OF SOCIAL SERVICES; and MELVIN POBANZ, individually and as Director of the EL PASO COUNTY DEPARTMENT OF PUBLIC WELFARE,

Petitioners.

v.

ASCENSION VIALPANDO for herself and her minor child, SABRINA VIALPANDO, and both on behalf of all others similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No.

CON F. SHEA, individually and as Executive Director of the DEPARTMENT OF SOCIAL SERVICES, STATE OF COLORADO; CHARLINE J. BIRKINS, individually and as Director of the COLORADO STATE DIVISION OF PUBLIC WELFARE; KEITH D. MCBURNEY, ERNEST J. BLOEDORN, MANUEL DIAZ, JOHN L. HALEY, JAMES A. HENDERSON, M.D., GAIL F. OUREN, HENRY J. TUPPER, WILLIE E. ANTHONY, JAMES H. VINCENT, individually and as constituting the COLORADO STATE BOARD OF SOCIAL SERVICES; and MELVIN POBANZ, individually and as Director of the EL PASO COUNTY DEPARTMENT OF PUBLIC WELFARE,

Petitioners.

v.

ASCENSION VIALPANDO for herself and her minor child, SABRINA VIALPANDO, and both on behalf of all others similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STATEMENT

The petitioners, Con F. Shea, et al, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on March 22, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The two opinions, not yet reported of the United States District Court for the

District of Colorado, and the judgment rendered by that Court also appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on March 22 1972. This petition for certiorari was filed within 90 days of that date. No motion for rehearing was filed. This Court's jurisdiction is invoked under 28 US.C. §§ 1254(1) and 2101(c). On April 13, 1973, the Court of Appeals entered an order staying the issuance of its mandate until May 12, 1973, to allow time for appellants to file a petition for a writ of certiorari.

QUESTIONS PRESENTED

1. Whether, in the administration of the Aid to Families with Dependent Children (AFDC) program, the use of a standardized statistically based work expense allowance, as described in Rule 4313.13 of the Colorado Division of Public Welfare Staff Manual, violates Title IV of the Social Security Act when read as a whole or whether such an allowance is a permissible method to be used to "take into consideration" any such work expenses and determine their reasonableness.

2. Whether the decisions below in this case conflict with the decisions of this Court regarding (a) the weight to be given to administrative interpretations by the responsible federal agency and (b) the scope of the discretion of the secretary of an executive department.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

"§601. Appropriations

For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children.

§602 State plans for aid and services to needy families with children; contents; aproval by secretary

(a) A State plan for aid and services to needy families with children must (1) provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them; . . . (5) provide (A) such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis except that the

Secretary shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Secretary to be necessary for the proper and efficient operation of the plan, and (B) for the training and effective use of paid subprofessional staff, with particular emphasis on the full-time or part-time employment of recipients and other persons of low income, as community services aides, in the administration of the plan and for the use of nonpaid or partially paid volunteers in a social service volunteer program in providing services to applicants and recipients and in assisting any advisory committees established by the State agency; and . . . (7) except as may be otherwise provided in clause(8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income; (8) provide that, in making the determination under clause (7), the State agency—

(A) shall with respect to any month disregard—

(ii) in the case of earned income of a dependent child not included under clause (1), a relative receiving such aid, and any other individual (living in the same home as such relative and child) whose needs are taken into account in making such determination the first $30.00 of the total of such earned

income for such month plus one-third of the remainder of such income for such month (except that the provisions of this clause (ii) shall not apply to earned income derived from participation on a project maintained under the programs established by section 632(b) (2) and (3) of this title); . . .

• • •

(10) provide, effective July 1, 1951, that all individuals wishing to make application for aid to families with dependent children shall have the opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals. . .

§1302. Rules and regulations

The Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health, Education and Welfare, respectively, shall make and publish such rules and regulations, not inconsistent with this chapter, as may be necessary to the efficient administration of the functions with which each is charged under this chapter.

STATEMENT OF THE CASE

The petitioners, Con F. Shea, et al., are responsible for the administration of the public assistance and social services programs in Colorado. The respondents, Ascension Vialpando, et al., were, at various times, applicants and recipients under the Aid to Families with Dependent Children (AFDC) program in Colorado.

Eligibility or continued eligibility for AFDC benefits

is, to a large degree, determined by the need of the applicant or recipient. The AFDC program is more fully described in *King v. Smith,* 392 U.S. 309 (1968), and *Rosado v. Wyman,* 397 U.S. 397 (1970).

In general, need is determined by comparing the applicant's or recipient's net income[1] to the state's standard of need.[2]

Under the Social Security Act, a state plan for Aid to Families with Dependent Children must, inter alia, "provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children . . . as well as any expenses reasonably attributable to the earning of any such income. . ." 42 U.S.C. §602(a)(7).

Prior to July of 1970, the Colorado regulations governing the Aid to Families with Dependent Children program provided a work expense allowance which included, but was not limited to, the actual cost of transportation, within certain limits. This included "purchase, repair, or upkeep of a vehicle, providing it is essential to retain employment and the plan therefore is approved by the county department." The policy was changed in May of 1970 to a maximum transportation work expense allowance of either $30 per month, if a car was needed to get

[1] Briefly, the computational sequence is as follows:

Gross Income
Less work incentive ($30 + 1/3 of the balance)
Sub Total
Less mandatory payroll deductions
Sub Total
Less allowable work expenses
Net Income

[2] The states have the option of comparing net income to percentage of the standard of need if insufficient funds are appropriated to pay 100% of the standard of need. The concept of standard of need is more fully described in **Rosado v. Wyman, supra.**

to or from work, or the actual expenses of public transportation. In July of 1970, the Colorado work expense allowance regulation was changed so that it consisted of (1) mandatory payroll deductions, plus (2) child care expenses, plus (3) $30. The $30 figure was based upon a statistical analysis of a statewide survey of actual work expenses.

The change in the state regulation in July of 1970 was considered to be consistent with the Social Security Act for several reasons. (These reasons are summarized and discussed more fully, with citations, in later sections of this petition). The change was approved by the United States Department of Health, Education, and Welfare (HEW). The method for taking work expenses into consideration and determining their reasonableness is not specified in either the Social Security Act or the federal regulations. The figure of $30 per month was based upon a statistical analysis of all actual work expenses of persons in the Aid to Families with Dependent Children program. The Social Security Act, when read as a whole, makes many requirements which must be reconciled. The program must be statewide. It should be efficiently administered. Error in administration should be minimized. The state is to administer the program to provide assistance and services "as far as practicable" to eligible persons. In *Rosado v. Wyman, supra,* the court approved the use of standardized amounts in another subsection of 42 U.S.C. §602. The long standing administrative interpretation of HEW has been to permit the use of standardized work expense allowances for some items of work expenses.

Prior to and after July of 1970, Mrs. Vialpando had a 1968 Volkswagen. Prior to July of 1970, the county department allowed her a work expense allowance which

included $47.30 per month for mileage and $63.81 for payments on the car.

The dispute in this case arose when the amended work expense allowance was applied to Mrs. Vialpando's case. Since the $30 statistically based standard allowance was less than the $47.30 in mileage plus $63.81 in car payments which she was previously allowed, her net income was increased above the standard of need and she was found to be ineligible for AFDC. The question of whether or not $30 is sufficient is not in question, the issue is whether or not the use of a standardized work expense allowance is permissible.

Mrs. Vialpando, and others, filed suit for injunction and declaratory relief under 42 U.S.C. §1983 on or about July 27, 1970, in the United States District Court for the District of Colorado. Jurisdiction was asserted under 28 U.S.C. §§1343(3) and (4), 2201 and 2202.

REASONS FOR GRANTING THE WRIT

I. THE DECISIONS BELOW CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT

A. *This Court Has Held that the Agency Interpretation of the Social Security Act is Entitled to Great Weight.*

Congress and this Court have firmly established that the Secretary of a federal executive agency has considerable discretion and statutory interpretations by such agencies are entitled to great weight. "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by

the officers or agency charged with its administration." *Udall v. Tallman,* 380 U.S. 1 (1965), *Lewis v. Martin,* 397 U.S. 552, 559 (1970), *United States v. City of Chicago,* 400 U.S. 8 (1970).

The Secretary of the United States Department of Health, Education, and Welfare (referred to hereafter as the "Secretary") has broad discretion. 42 U.S.C. §1302.

B. *The Secretary Must Harmonize Several Provisions of the Social Security Act in Determining Whether or Not to Approve a State Plan which Utilizes a Standardized Work Expense Allowance.*

The Social Security Act must be read as a whole. See *Ginsburg and Sons v. Popkin,* 285 U.S. 204 (1932). In this case, the Social Security Act creates several requirements which must be reconciled by the Secretary or his designee. *Udall v. Tallman,* supra at 9.

1. *The Requirement for a Statewide Program*:

The Secretary must ensure that an AFDC state plan will provide that the program will be in effect in all political subdivisions of the state. 42 U.S.C. §602(a)(1). This requirement carries with it a mandate for uniformity throughout the state which is not possible with subjective item by item determination of whether or not a particular expenditure by an individual was reasonably attributable to the earning of income.

2. *The Requirement for Efficient Administration*:

Under 42 U.S. §602(a)(5) a state plan must provide for "such methods of administration . . . as are found by

the Secretary to be necessary for the proper and efficient operation of the plan . . ." The use of a standardized work expense allowance reduces administrative costs and errors[3] in determining eligibility.

3. *The Requirement for Prompt Assistance*:

Assistance must be provided with "reasonable promptness to all eligible individuals." 42 U.S.C. §602(a)(10). The delays inherent in item by item consideration of work expenses can be avoided by using a standardized allowance.

4. *The States have Considerable Latitude in Allocating Funds Available for Welfare Purposes*:

The States are only required to furnish financial assistance and rehabilitation and other services "as far as practicable." 42 U.S.C. §601.

The subsection in question, 42 U.S.C. §602(a)(7), requires that a state "take into consideration" certain work expenses and determine whether they are "reasonably attributable" to the earning of income. The statute does not prescribe a method for either taking work expenses into consideration or determining their reasonableness. This Court has recognized the need for allowing the states considerable latitude in allocating the funds available for welfare purposes. *King v. Smith,* supra *Dandridge v. Williams,* 397 U.S. 471 (1970), and *Jefferson v. Hackney,* 406 U.S. 435 (1972). The use of a statewide standard of need permitted by this court in *Rosado*

[3] New federal regulations have been published which will impose financial penalties upon the states for errors in eligibility determinations. 38 Fed. Reg. 8743 (1973) The new regulations impose extremely strict requirements for "zero error." A standardized work expense allowance would be necessary if errors are to be avoided.

v. Wyman, supra, is not legally distinguishable from the use of a standard work expense allowance based upon a statistical analysis of all actual work expenses.

C. *The Secretary in Harmonizing the Foregoing Provisions has Consistently Approved the Use of Standardized Work Expense Allowances Since 1957.*

State Letter 291, dated March 11, 1957, was sent "TO STATE AGENCIES ADMINISTERING APPROVED PUBLIC ASSISTANCE PLANS," by the Social Security Administration of HEW. It transmitted various new pages for the *Handbook of Public Assistance Administration* (hereafter referred to as the "Handbook"), including Section 3140 "Specific Applications — Income and Resources 1, Employment Expenses." This regulation permitted a flat work expense allowance for food, clothes, and personal incidentals. (A copy of the relevant parts of Section 3140 has been included in the Appendix hereto).

On July 25, 1962, 42 U.S.C. §602(a)(7) was amended by Section 106(b) Public Law 87-543 to provide for taking work expenses into consideration.

On April 22, 1964, the *Handbook of Public Assistance Administration* was amended. The amended *Handbook* reaffirmed the use of standardized work expense allowances for food, clothing, and personal incidentals. (A copy of the relevant parts of Section 3140 of the *Handbook* as amended has been included in the Appendix hereto).

On July 17, 1968, with the approval of Secretary Wilbur J. Cohen, Interim Policy Statement No. 4 was published. (33 Federal Register 10230). It required the dis-

regard of income equal to expenses reasonably attributable to the earning of income. It replaced Section 3140 of the *Handbook*. However, the *Handbook* provisions are still used to interpret the federal regulations and the Social Security Act.

The new regulations reflecting the comments received on Interim Policy No. 4 (33 Federal Register 10230) were published on January 29, 1969 (34 Federal Register 1394).

On September 26, 1969, HEW sent a letter "To State Agencies Administering Approved Public Assistance Plans." This letter approved of standardized work expense allowances and provided tables for applying such allowances. (A copy of the letter of September 20, 1969 has been included in the Appendix hereto, less tables).

In 1970, HEW approved Colorado's $30 statistically based standard work expense allowance, which became effective in July of 1970.

The Brief of the United States as Amicus Curiae filed in *Adams v. Parham,* Civil Action No. 16041 (N.D. Ga. filed April 14, 1972) described the Secretary's interpretation of the Social Security Act which permitted the use of standardized work expense allowances.

D. *Conclusion.*

The Social Security Act, the implementing regulations, and particularly the State letters are addressed to the States. Recipients do not file direct claims against HEW under these regulations. The HEW State letters are statements of the Secretary's criteria for approval of state plans. See *United States v. Frazer,* 297 F. Supp.

319 (M.D. Ala. N.D. 1968); 317 F. Supp. 1079 (M.D. Ala. N.D. 1970).

The regulations, State letters and Brief of the United States as Amicus Curiae in *Adams v. Parham* indicate that the Secretary has exercised his broad discretion and interpreted the Social Security Act to permit the use of standardized work expense allowances.

In view of the foregoing, the petitioners submit that the Court of Appeals and the District Court miscontrued, misapplied, or misconceived the applicable decisions of this Court and, in effect, ignored the Secretary's interpretation and refused to recognize the Secretary's discretionary powers. Accordingly, the pending petition for a writ of certiorari should be granted. *Schlude v. Commissioner*, 372 U.S. 128, 130 (1963).

II. THE OPINIONS OF THE COURTS BELOW SERIOUSLY HINDER THE EFFECTIVE ADMINISTRATION OF THE SOCIAL SECURITY ACT.

Apart from the lower court decisions in this case, a considerable body of lower court case law has developed in related cases. The overall effect of these decisions is to seriously hinder the effective administration of the Social Security Act.

Some of these courts have ruled in favor of standardized work expenses allowances.[4] Others have not.[5]

[4] The Califorina Court of Appeal for the Third Appellate District on November 13, 1972, reversed the trial courts' order granting a preliminary injunction against the enforcement of the provisions of Sec. 11451.6 of the Welfare and Institutions Code. The cited statute provided for a fifty dollar per month work expense allowance, plus reasonable and necessary costs of child care. On January 17, 1973, the California Supreme Court granted a hearing. **Conover v. Hall, 104 Cal. Reptr. 77 (Cal. App. 1972)**, hearing granted January 17, 1973.

The fact that issues in this case or similar issues have been presented to a substantial number of courts with varying results indicates the importance of the questions and the difficulty which state directors of public welfare have in determining what is permissible under the Social Security Act. The Circuit Court opinion in this case can be interpreted to mean that the states cannot rely upon instructions and interpretations from HEW.

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[4] continued

In the form of dicta, a three judge federal district court approved New Jersey's fifty dollar per month work expense allowance and said that "if a state may use statistical averages to determine the various components of need, it may also do so to compute business expenses." The issue was not presented to the U.S. Supreme Court. **Engleman v. Amos,** 333 F. Supp. 1109 (D.N.J. 1970), modified on other grounds. 404 U.S. 23 (1971).

The U.S. District Court for the Eastern District of Michigan approved a settlement approved by the U.S. Department of Health, Education and Welfare which included at $40.00 maximum work expense allowance. **Michigan Welfare Rights Organization v. Houston,** Civil Action No. 34529 (E.D. Mich. filed April 30, 1971).

[5] In **Adams v. Parham,** supra, a single District Court judge held that a $35 per month flat work expense allowance was invalid. The Court ruled upon the District Court decision in the present case and upon **Williford v. Laupheimer,** infra.

In **Campagnuolo v. White,** Civil Action No. 13968 (D. Conn. filed June 22, 1972) a single federal district judge held that a $60 per month flat work expense allowance for full time employment and a $40 per month allowance for the expenses resulting from part time employment were invalid if recipients were not allowed to prove and deduct actual expenses in excess of the flat amounts.

The Second Circuit has held that the state could not limit the types of work expenses to mandatory payroll deductions and child care expenses. **Connecticut State Department of Public Welfare v. Department of Health, Education and Welfare,** 448 F. 2d 209 (2d Cir. 1971).

County of Alameda v. California, 97 Cal. Reptr. 385, 5 Cal. 3d 730, 488 P.2d 953, (1971), Appeal Dismissed 406 U.S. 913 (1972), involved state work expense allowance regulations which provided for standard deductions ranging from $6 to $25 per month. The California Supreme Court invalidated the regulation. The frequently cited case of **Williford v. Laupheimer,** 311 F. Supp. 720 (E.D. Pa. 1969) involved a maximum, rather than a statistically based flat grant. Accordingly it is distinguishable. New federal regulations have been published which will impose financial penalties upon the states for errors in eligibility determinations. 38 Fed. Reg. 8743 (1973). The new regulations impose extremely strict requirements for "zero error." A standardized work expense allowance would be necessary if errors are to be avoided.

In **Anderson v. Graham,** Civil Action No. CV 72-L-176 (D. Nebraska ~~filed~~ decided April 6, 1973) the Court invalidated the Nebraska $25 standard work expense allowance.

III. CONCLUSION

The Court of Appeals' decision is in conflict with applicable decisions of this Court. The states are constantly faced with the question whether to follow instructions from HEW (and risk being sued by recipients) or not following such instructions (and risk losing federal funds). This Court has been rather uniform in upholding instructions from the responsible federal agency in the latter context. In this case, this Court is being asked to resolve the substantial federal question of whether welfare recipients can successfully sue a state when the state is acting within its own broad discretion and is using a method approved by HEW to comply with the Social Security Act.

For the reasons set forth in this petition a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 72-1218 and 72-1345 — January 1973 Term

ASCENSION VIALPANDO for herself and her minor child, SABRINA VIALPANDO, and both on behalf of all others similarly situated,

Plaintiff-Appellee

v.

CON F. SHEA, individually and as Executive Director of the DEPARTMENT OF SOCIAL SERVICES, STATE OF COLORADO; CHARLINE J. BIRKINS, individually and as Director of the COLORADO STATE DIVISION OF PUBLIC WELFARE; KEITH D. MCBURNEY, ERNEST J. BLOEDORN, MANUEL DIAZ, JOHN L. HALEY, JAMES A. HENDERSON, M.D., GAIL F. OUREN, HENRY J. TUPPER, WILLIE E ANTHONY, JAMES H. VINCENT, individually and as constituting the COLORADO STATE BOARD OF SOCIAL SERVICES; and MELVIN POBANZ, individually and as Director of the EL PASO COUNTY DEPARTMENT OF PUBLIC WELFARE,

Defendants-Appellants

Appeal from the United States District Court
for the District of Colorado
(DC-C-2449)

[Filed Mar. 22, 1973]

Charles B. Lennahan, Special Assistant Attorney General, Denver, Colorado (Duke W. Dunbar, Attorney General, John P. Moore, Deputy Attorney General, and Douglas D. Doane, Special Assistant Attorney General, Denver, Colorado, with him on the brief) for Appellants, except Melvin Pobanz.

James W. Kin, El Paso County Legal Services Office, Colorado Springs, Colorado, (Tom W. Armour, El Paso County Legal Services Office, Colorado Springs, Colorado, and Kenneth Neiman, Steven J. Cole and Henry

A. Freedman, N.L.S.P., Center on Social Welfare Policy and Law, New York, New York, of Counsel, with him on the brief) for Appellees.

Before LEWIS, Chief Judge; PICKETT and McWILLIAMS, Circuit Judges.

LEWIS, Chief Judge.

In its present posture, this is a private action brought by appellees, Colorado welfare recipients, against state officials administering the Colorado welfare program. The appeal is from a judgment requiring appellants to implement a modification of the Colorado Division of Public Welfare Manual, § 4313.13 to comply with 42 U.S.C. § 602(a)(7) in determining a family's need under the Aid to Families with Dependent Children (AFDC) program. No party raises any question concerning the nature of the relief granted below.

The AFDC program is financed largely by the federal government on a matching fund basis and is administered by the states. An AFDC grant is computed by comparing a family's income and resources to a standard of need statistically determined by the state. The family income used in this comparison is gross family income less certain exclusions mandated by 42 U.S.C. § 602(a)(7), an employment expense provision, and 42 U.S.C. § 602(a)(8), an income disregard provision. On July 1, 1970 the Colorado Board of Social Services promulgated section 4313.13 of the Colorado Division of Public Welfare Manual. This regulation limits employment expenses under 42 U.S.C. § 602(a)(7) to a standardized $30 figure plus mandatory payroll deductions and child care expenses. The $30 standardized figure is an average based on a statistical survey and is meant to cover "employment

expenses such as transportation, special clothing, union dues, special education or training costs, telephone, additional food or personal needs. . . ." The Colorado method of treating employment expenses embodied in section 4313.13 was approved by the Department of Health, Education and Welfare.

Prior to the effective date of section 4313.13, Colorado excluded from family income all expenses reasonably attributable to the earning of such income. The effect of the new regulation which allows only a standardized exclusion for employment expenses other than mandatory payroll deductions and child care expenses was to reduce appellees' excludible [sic] employment expenses to such an extent that their net income after the exclusions was greater than Colorado's standard of need. As a consequence, appellees were ineligible for AFDC grants and they initiated this action seeking damages and declaratory and injunctive relief. The district court held that the standardization of employment expenses in the new Colorado regulation did not comply with 42 U.S.C. § 602(a)(7) and granted the relief sought.

42 U.S.C. § 602(a)(7) requires that a state AFDC plan must "provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children . . . as well as *any* expenses reasonably attributable to the earning of any such income." (Emphasis added.) We interpret the words "any expenses" to mean all actual expenses. Thus 42 U.S.C. § 602(a)(7) requires the states to consider all actual expenses reasonably attributable to the earning of income in determining need. *See* Amos v. Engelman, D.N.J. 333 F. Supp. 1109, 1119 (three-judge court); *modified on other grounds,* 404 U.S. 23. This interpretation is con-

sistent with the congressional intent that the states should "take these [employment] expenses *fully* into account." S. Rep. No. 1589, 87 Cong., 2d Sess., 1962 U.S. Code Cong. & Ad. News 1943, 1960 (emphasis added). The use of a standardized employment expense exclusion does not take into consideration all actual expenses when a family's expenses exceed the standardized allowance. *CF* Amos v. Engelman, *supra*. In the instant case the appellees' actual employment expenses consistently exceeded the $30.00 standard exclusion. Consequently, Colorado's application of the standardized allowance in determining the appellees' needs does not comply with 42 U.S.C. § 602(a)(7). Campagnuolo v. White, D. Conn., Civil No. 13968; Adams v. Parham, N.D. Ga., Civil No. 16041.

The appellants maintain that the words "take into consideration" in 42 U.S.C. § 602(a)(7) sanction the use of a standardized employment expense exclusion in determining need in all cases. Their reasoning is that these words do not dictate a specified method for treating employment expenses and that the use of a standardized allowance is one acceptable way of taking into consideration expense of employment. The phrase "take into consideration" is flexible and by itself does not require a particular treatment of employment expenses. However, when considered in the statutory framework of 42 U.S.C. § 602(a)(7), these words assume a particular meaning. It should be noted that the phrase "take into consideration" modifies both "income" and "expenses." Consequently, Congress intended employment expenses to be treated in the same manner as income.[1] Since considera-

[1] When considering the 1962 amendment which added the employment expense provision, Congress specifically recognized that "all income of recipients . . . is taken into account . . . in determining need." S. Rep. No. 1589, 87 Cong., 2d Sess., 1962 U.S. Code Cong., & Ad. News 1943, 1959. (Emphasis added.) Thus Congress intended that all employment expenses also be considered. See 45 C.F.R. § 233-20 (a)(7)(i).

tion of each family's income must necessarily be based on actual rather than average figures, expenses attributable to the earning of such income must be taken into consideration in the same manner.

Appellants also contend that the Supreme Court in Rosado v. Wyman, 397 U.S. 397, approved the principle underlying the use of a standardized employment expense allowance. The Rosado case involved 42 U.S.C. § 602(a)(23) and sanctioned the use of statistical averages in computing a standard of need to be applied in the states' administration of their AFDC programs.[2] The Supreme Court has continually stressed the states' "undisputed power" to determine this standard of need. King v. Smith, 392 U.S. 309, 334; Dandridge v. Williams, 397 U.S. 471, 478. Congress itself did not encroach upon this undisputed power until the passage of 42 U.S.C. § 602(a)(23) in 1967.[3] Nevertheless, 42 U.S.C. § 602(a)(7) is indicative of congressional reluctance to give the states the same unfettered discretion to determine the needs of a particular family. Thus, Suprme Court approval of the use of statistical averages in determining the standard of need is not a mandate for judicial approval of such averaging in determining the needs of a particular family under 42 U.S.C. § 602(a)(7). *But see* Amos v. Engelman, D. N.J., 333 F. Supp. 1109, 1119 (three-judge court), *modified on other grounds,* 404 U.S. 23.

[2] In **Rosado** the Court said: "We do not, of course, hold that New York may not, consistently with the federal statutes, consolidate items on the basis of statistical averages. . . . Providing all factors . . . are accounted for and fairly priced and providing the consolidation on a statistical basis reflects a fair averaging, a State may, of course, consistently with [42 U.S.C. § 602(a)(23)] redefine its method for determining need. . . . New York is not foreclosed from accounting for basic and recurring items of need . . . by an averaging system." Rosado v. Wyman, 397 U.S. 397, 419-20.

[3] 42 U.S.C. § 602(a)(23) required the states to adjust their standards of need by July 1, 1969 in order to reflect cost of living increases.

Additionally, an understanding of the manner in which a state's standard of need and the computation of a particular family's available income and resources under 42 U.S.C. § 602(a)(7) complement each other illustrates the incongruity of Colorado's standardized employment expenses allowance in the instant case. The standard of need is a dollar amount representing the costs of those items which a state has determined to be necessary to maintain a hypothetical family at a subsistence level. Such an estimate by its nature is susceptible to computation through the use of statistical averages and it was thus fitting for the Supreme Court to approve the use of an averaging system in *Rosado*. A state must compare its standard of need to the income and resources actually available to the particular family in order to establish financial eligibility and the amount of an AFDC grant. 45 C.F.R. § 233.20(a)(3)(ii)(a) and (c). 42 U.S.C. § 602(a)(7) requires that the computation of income and resources available to the particular family must take into consideration any expenses reasonably attributable to the earning of income. To uniformly apply a standardized employment expense allowance rather than consider actual expenses in this computation would render meaningless the process of comparing a particular family's available income and resources with a hypothetical family's standard of need.

The problem with the Colorado system is not its use of a standardized allowance but the intransigent adherence to this standard when a particular family's expenses of employment exceed the allowance. In such cases, Colorado's standard allowance operates as a maximum allowance which we also consider to be inconsistent with 42 U.S.C. § 602(a)(7). Williford v. Laupheimer, E.D. Penn., 311 F. Supp. 720 (three-judge court). Nevertheless, a

reasonable interpretation of the statute permits "a state to use a standard deduction for [employment] expenses in the interest of efficient administration of the [AFDC] program, *provided the allowance is adequate to cover all actual expenses.*" Amos v. Engelman, D.N.J., 333 F. Supp. 1109, 1119 (three-judge court), *modified on other grounds,* 404 U.S. 23. (Emphasis added.)

Our interpretation of 42 U.S.C. § 602(a)(7) is consistent with the statutory history and the explicit congressional purpose of providing AFDC families with an incentive to seek employment. S. Rep. No. 1589, 87 Cong. 2d Sess., 1962 U.S. Code Cong. & Ad. News 1943, 1960. Although appellants present numerous policy reasons for a different result, it is not within our realm to legislate social policy. Jefferson v. Hackney, 406 U.S. 535, 541; Dandridge v. Williams, 397 U.S. 471, 487; Rosado v. Wyman, 397 U.S. 397, 422. One specific policy argument deserving comment even in the context of our limited role is the appellants' contention that our decision will compel states to consider unnecessary expenditures. Such fears should be allayed by the statute itself which requires that the subject expenses be reasonably attributable to the earning of income.

Appellants emphasize the approval of section 4313.13 of the Colorado Division of Public Welfare Manual by the Department of Health, Education and Welfare and maintain that this approval should be accorded substantial weight as a statutory interpretation by the department responsible for the administration of the Social Security Act. This principle, however, is inapplicable when a departmental interpretation is inconsistent with the controlling statute. Townsend v. Swank, 404 U.S. 282, 286. Equally without merit is appellants' contention that under

42 U.S.C. § 604(a)(2) states need only substantially comply with federal statutory requirements. *See* Rosado v. Wyman, 397 U.S. 397, 408; King v. Smith, 392 U.S. 309, 316-17. 42 U.S.C. § 604(a)(2) provides an administrative procedure whereby the Secretary of Health, Education and Welfare may cease funding state programs in order to compel substantial compliance with federal statutory requirements. This statute is inapposite in suits by prospective recipients against state agencies responsible for the administration of the AFDC program.

Affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. C-2449

ASCENSION VIALPANDO for herself and her minor child, SABRINA VIALPANDO, and both on behalf of all others similarly situated,

Plaintiffs

v.

CON F. SHEA, individually and as Executive Director of the DEPARTMENT OF SOCIAL SERVICES, STATE OF COLORADO; CHARLINE J. BIRKINS, individually and as Director of the COLORADO STATE DIVISION OF PUBLIC WELFARE; KEITH D. MCBURNEY, ERNEST J. BLOEDORN, MANUEL DIAZ, JOHN L. HALEY, JAMES A. HENDERSON, M.D., GAIL F. OUREN, HENRY J. TUPPER, WILLIE E ANTHONY, JAMES H. VINCENT, individually and as constituting the COLORADO STATE BOARD OF SOCIAL SERVICES; and MELVIN POBANZ, individually and as Director of the EL PASO COUNTY DEPARTMENT OF PUBLIC WELFARE,

Defendants

Legal Services Office of El Paso County by Messrs. James W. Kin and Tom W. Armour, Attorneys at Law, 104 South Tejon, Suite 300, Colorado Springs, Colorado, for Plaintiffs; Mr. Duke W. Dunbar, Attorney General and Mr. John P. Moore, Deputy Attorney General by Messrs. Douglas D. Doane and Charles B. Lennahan, Special Assistant Attorneys General, 104 State Capitol, Denver, Colorado, for State defendants; Mr. Norman A. Palermo, Attorney at Law, Suite 602 Pikes Peak Building, Colorado Springs, Colorado, for defendant Pobanz.

MEMORANDUM OPINION

ARRAJ, Chief Judge.

Following our summary judgment in this case, defendants submitted a pleading denoted "Motion for a New Trial" and a request for a stay of execution to permit

the court to examine "newly discovered evidence" in the form of an amicus curiae brief submitted on behalf of the Secretary of Health, Education and Welfare (HEW) in a case similar to the present one. We allowed a temporary stay pending our reconsideration of this case and to consider the position of HEW. We have fully considered the additional facts and background presented by HEW and determine that they do not affect the legal conclusion we reached earlier.

The defendants seem to misunderstand the nature of the deference shown to HEW. If the question before us were whether a flat grant system would simplify and streamline the AFDC program, then we might well be persuaded that it would. Were we deciding the wisdom of creating a "consumption incentive" by not rewarding welfare recipients who cut down on their work-related expenses, our conclusion might be that this was not a wise policy. But these are not the questions before this court; we are asked to interpret § 402(a)(7) of the Social Security Act, 42 U.S.C. § 602(a)(7).

As we noted earlier, Congress enacted § 402(a)(7) to remove the disincentive to work caused by the increased expenses resulting from most jobs. We should keep in mind that when this amendment was passed, it was the only income disregard provision of general application. (Certain stipends paid in connection with job-training programs were being disregarded.) It was not until several years later that § 402(a)(8) created positive incentives to work by providing that the first $30 per month plus 1/3 of the remainder shall be disregarded in determining need.

It may well be that § 402(a)(7) is an anacronism

and that it would be better simply to increase the incentive under § 402(a)(8) by another $30, say, which is approximately the effect of Colorado's Section 4313.13 provision. Congress has not chosen to do this, and no amount of deference to HEW's technical knowledge and administrative experience would justify our rewriting the enactment or contorting its meaning.

A comparison of the cases of *King v. Smith,* 392 U.S. 309 (1968) and *Lewis v. Martin,* 397 U.S. 552 (1970) demonstrates the kind of deference courts should show to HEW. Both cases voided state regulations which would have considered the income of "substitute fathers" or of "men assuming the role of a spouse" in determining need, as violative of the Social Security Act. When *King v. Smith,* was decided, HEW generally approved state programs containing a "man-in-the-house" provision. *King v. Smith, supra* at 334 (Douglas, J., concurring). The particular Alabama regulation involved had not been sanctioned by HEW because of its unique provision that a man cohabiting or having frequent sex relations with a dependent child's mother outside the mother and child's home could be considered a "substitute father." The Court did not adopt the HEW position, but went further, concluding that no "substitute father's" income could be considered unless he was legally obliged to support the child. HEW revised its regulations to conform to this decision, adding a provision that a stepfather's income would not be considered unless he was "legally obliged to support the child under State law of general applicability which required stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children." *Lewis v. Martin* upheld this regulation because HEW could "reasonably conclude that an obligation to support under state law must be of 'gen-

eral applicability' to make that obligation in reality a solid assumption on which estimates of funds actually available to children on a regular basis may be calculated." 397 U.S. at 558-559. The Court did not want state law to become a device for lowering welfare costs without guaranteeing the child would actually regularly receive the income of the stepparent. Thus it can be seen that a position taken by HEW based simply on its own interpretation of a statutory enactment does not receive the same deference as a HEW position based on HEW's factual understanding of the realities of the program it administers. *Cf. Torres v. New York State Department of Labor,* 321 F. Supp. 432 (S.D.N.Y. 1971), vacated 402 U.S. 968. We would show deference to HEW's factual conclusions that a flat grant may be a more efficient way to deal with work expenses, but we cannot agree with its legal conclusion that § 402 (a)(7) allows this.

The HEW amicus brief describes the process it would require states to go through in order to arrive at a figure which would take expenses "fully into account."

> . . . [A]s a starting point in justifying its flat amount of $35 for work expenses . . . Georgia must identify exactly what items of work expenses are being covered, and on what basis . . .
>
> Once the items have been identified, the much harder job is to show that they have been fairly priced and fairly averaged. The averaging itself may be quite intricate mathematically, but it can be accomplished readily by those who have the requisite competence, provided the data are available on how many individuals had what work expense at what monthly cost. The real problem is to gather the data.
>
> For the agency to conduct an interview in depth

with each recipient who works, and thus determine the exact work expense, and repeat this process over many months to reflect seasonal variations, would yield accurate information, but would be wasteful of time, staff and money. Statistical sampling techniques can yield sufficiently valid results that the State already has information in its case records [sic.], the sampling can be facilitated by using the case records rather than interviews. Nevertheless, under the current HEW practice, a State that wishes to use a flat amount must validate it by accepted techniques of one kind or another.

. . . [C]urrent costs of work expense items . . . could be [ascertained] by interviewing a cross-section of cases. Alternatively, the State could analyze a sample of its case records for periods prior to May, 1969, when the State recognized work expenses on an individualized basis. The costs thereby determined would of course have to be updated to reflect increases in cost levels since the period surveyed. . . .

[A flat amount] must be supported by vigorous justification on an adequate objective basis. . . .

We cannot believe Congress intended to force states to go through such an elaborate process in order to arrive at an approximation. Rather, Congress insisted expenses be taken "fully" into account in order that no recipient would suffer under a disincentive to work, since at that time there were not the positive incentives that now exist.

In conclusion, it should be understood that we are expressing no opinion whatsoever as to whether the work expenses claimed by Mrs. Vialpando are or are not reasonably related to her employment. We hold only that

Colorado may not use a flat amount for work expenses and deny Mrs. Vialpando credit on that basis.

For the reasons herein given, defendants' motion for a new trial is denied.

DATED at Denver, Colorado, this 9th day of March, 1972.

BY THE COURT:

ALFRED A. ARRAJ,
Chief Judge
United States District Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action C-2449

ASCENSION VIALPANDO for herself and her minor child, SABRINA VIALPANDO, and both on behalf of all others similarly situated,

Plaintiffs

v.

CON F. SHEA, individually and as Executive Director of the DEPARTMENT OF SOCIAL SERVICES, STATE OF COLORADO; CHARLINE J. BIRKINS, individually and as Director of the COLORADO STATE DIVISION OF PUBLIC WELFARE; KEITH D. MCBURNEY, ERNEST J. BLOEDORN, MANUEL DIAZ, JOHN L. HALEY, JAMES A. HENDERSON, M.D., GAIL F. OUREN, HENRY J. TUPPER, WILLIE E ANTHONY, JAMES H. VINCENT, individually and as constituting the COLORADO STATE BOARD OF SOCIAL SERVICES; and MELVIN POBANZ, individually and as Director of the EL PASO COUNTY DEPARTMENT OF PUBLIC WELFARE,

Defendants

JUDGMENT

[Filed Feb. 17, 1972]

This action having come on for hearing before the Court on December 17, 1971, Honorable Alfred A. Arraj, Chief Judge, United States District Court, presiding, and the issues having been duly heard and an opinion having been duly rendered on January 13, 1972.

IT IS HEREBY ORDERED, ADJUDICATED AND DECREED as follows:

1. That the Plaintiff's Motion for Summary Judgment is hereby granted and the Defendants' Cross-Motion for Summary Judgment is hereby denied in conformance with the opinion rendered by this Court on January 13, 1972.

2. The defendants are granted a stay of ten days from and after the date of entry of this judgment for the purposes of seeking an appeal or review of this ruling. This judgment shall not be effective until said ten day period has expired.

3. That the State of Colorado, the State Board of Social Services and Con F. Shea, Executive Director of the Department of Social Services, State of Colorado, are hereby ordered and directed at the next regularly scheduled meeting of the State Board of Social Services, after this judgment becomes effective to implement the modification of Section 4313.13 of the Colorado Division of Public Welfare Manual, Vol. IV, to comply with the Federal Social Security Act and H.E.W. regulations as is set out in the Court's Opinion of January 13, 1972.

4. That this case is not and has not been a class action. Accordingly, it does not afford declaratory relief to the members of the alleged class.

5. That this judgment confers no right upon the members of the alleged class to retroactive payments.

6. That pursuant to the Order of the Court entered January 13, 1972, the named plaintiffs are entitled to damages due to the defendants' miscalculation of plaintiffs' work expenses and that the amount of such damages shall be determined by the administrative process of the defendants' state and county agencies.

7. Each party shall bear their own costs.

Appendix C-3

Dated February 17, 1972.

ALFRED A. ARRAJ
Chief Judge
United States District Court

Approved as to Form:

JAMES W. KIN
Attorney for Plaintiffs

DOUGLAS D. DOANE
Attorney for State Defendants

NORMAN A. PALERMO
Attorney for Defendant Pobanz

[Entered on the Docket Feb. 18, 1972]

Appendix D-1

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action C-2449

ASCENSION VIALPANDO for herself and her minor child, SABRINA VIALPANDO, and both on behalf of all others similarly situated,

Plaintiffs

v.

CON F. SHEA, individually and as Executive Director of the DEPARTMENT OF SOCIAL SERVICES, STATE OF COLORADO; CHARLINE J. BIRKINS, individually and as Director of the COLORADO STATE DIVISION OF PUBLIC WELFARE; KEITH D. MCBURNEY, ERNEST J. BLOEDORN, MANUEL DIAZ, JOHN L. HALEY, JAMES A. HENDERSON, M.D., GAIL F. OUREN, HENRY J. TUPPER, WILLIE E. ANTHONY, JAMES H. VINCENT, individually and as constituting the COLORADO STATE BOARD OF SOCIAL SERVICES; and MELVIN POBANZ, individually and as Director of the EL PASO COUNTY DEPARTMENT OF PUBLIC WELFARE,

Defendants

[Filed Jan. 13, 1972]

Legal Services Office of El Paso County by Messrs. James W. Kin and Tom W. Armour, Attorneys at Law, 300 Old Colorado Commercial Bank Building, Colorado Springs, Colorado, for Plainitffs; Mr. Duke W. Dunbar, Attorney General and Mr. John P. Moore, Deputy Attorney General by Mr. Douglas D. Doane, Special Assistant Attorney General, 104 State Capitol, Denver, Colorado, for State defendants; Mr. Norman A. Palermo, Attorney at Law, Suite 602 Pikes Peak Building, Colorado Springs, Colorado, for defendant Pobanz.

Appendix D-2

MEMORANDUM OPINION AND ORDER

ARRAJ, Chief Judge

This case raises the question of whether Colorado has complied with the requirements of § 402(a)(7) of the Social Security Act, 42 U.S.C. § 602(a)(7),[1] that state welfare agencies, in figuring financial need under the Aid to Families with Dependent Children (AFDC) program, "shall . . . take into consideration . . . any expenses reasonably attributable" to the earning of income by an employed welfare recipient, when it allows a flat thirty dollar credit regardless of the recipient's actual work-related expenses. Plaintiff brings this as a class action on behalf of all employed welfare recipients whose actual work-related expenses exceed thirty dollars per month, but who are allowed credit for only thirty dollars under the provisions of Section 4313.13 of the Colorado Division of Public Welfare Staff Manual, Vol. IV,[2] and the practices of the defendants. She claims that the Colorado rules and practices violate § 402(a)(7) of the federal act and do not meet the requirements of the regulations adopted by the Department of Health, Education and Welfare. 45 C.F.R.

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[1] Title 42 U.S.C. § 602(a)(7) provides:

> (a) A State plan for aid and services to needy families with children must . . . (7) . . . provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual living in the same home as such child and relative whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income; . . .

[2] Section 4313.13 includes the following provision:

> For employment expenses such as transportation, special clothing, union dues, special education or training costs, telephone, additional food or personal needs, etc., which are an obligation due to the employment, an allowance of $30 per month is made for such costs.

§ 233.20(a)(3)(iv).[3] She also raises constitutional questions which are not under consideration at this time.[4] The case is presently before us on both parties' motions for summary judgment.

The facts are not in significant dispute. The plaintiff Ascension Vialpando was employed and receiving an Aid to Families with Dependent Children grant of seventy-four dollars per month prior to July, 1970. Effective July 1, 1970, the defendants promulgated a new regulation limiting the amount of work-related expenses which a recipient could have exempted from deductions in determining AFDC grants to thirty dollars (besides mandatory payroll deductions). This regulation reduced the plaintiff's budgeted work-expense figure from $181.83 to $85.72 ($55.72 mandatory payroll deductions plus thirty dollars), making the plaintiff ineligible for AFDC. Plaintiff claims that while in theory she should have been able to be self-sufficient, since her earnings adequately provided for her budgeted needs, in fact $96.11 of her earnings had to be used to earn that income and was not available to be ap-

[3] Title 45 C.F.R. § 233.20 provides:

(a) Requirements for State Plans. A State Plan for OAA, AFDC, AB, APTD, or AABD must, as specified below:

. . .

(3) Income and resources; . . .

(ii) Provide that, in establishing financial eligibility and the amount of the assistance payment; (a) All income and resources, after policies governing the allowable reserve, disregard or setting aside of income and resources have been applied, will be considered in relation to the State's standard of assistance, . . . (c) only such net income as is actually available for current use on a regular basis will be considered and only currently available resources will be considered; . . .

. . .

(iv) Provide that, in determining the availability of income and resources, the following will not be included as income: (a) Income equal to expenses reasonably attributable to the earning of income; . . .

[4] We will recommend that a three-judge court be convened only if the case cannot be disposed of on the statutory ground. **Davidson v. Shaffer**, C.A. No. C-3224 (D. Colo. Nov. 10, 1971); **see Rosado v. Wyman**, 397 U.S. 397, 40 (1970).

plied to her basic needs. In August, 1970, the plaintiff terminated her employment and again received an AFDC grant. On September 1, 1971, plaintiff returned to work and now has expenses of over $100 per month which she alleges are reasonably related to her employment.

Section 402(a)(7) of the Social Security Act amendments of 1962 was designed to encourage welfare recipients to obtain employment, even if their salaries from that employment would not enable them to be completely self-sufficient. Congress recognized that certain extra expenses are incurred by a person holding a job. The Senate report on the bill explains the purposes of this section:

> Under present law, all income of recipients of public assistance is taken into account (with a limited exception under title X in determining need. States are permitted, but not required, to take into consideration the expenses an individual has in earning any income (this practice is not uniform in the country and in a substantial number of States full consideration of such expenses is not given). The committee believes that it is only reasonable for the States to take these expenses fully into account. Under existing law if these work expenses are not considered in determining need, they have the effect of providing a disincentive to working since that portion of the family budget spent for work expenses has the effect of reducing the amount available for food, clothing, and shelter. The bill has, therefore, added a provision in all assistance titles requiring the States to give consideration to any expense reasonably attributable to the earning of income. S. REP. NO. 1589, 87th Cong., 2d Sess., found at U.S. CODE CONG. & AD. NEWS 1943, 1959-1960 (1962).

We believe that Congress clearly intended for states to give full credit for all expenses reasonably related to a recipient's employment.

The question of the validity of Colorado's § 4313.13 depends then upon whether a state must comply with all the provisions of the Social Security Act when it accepts federal funds threeunder or whether an approximate compliance is sufficient. The defendant argues that thirty dollars per month is a reasonable approximation of the actual work-related expenses of most employed recipients and that by taking this sum into consideration they have complied sufficiently with § 402(a)(7) of the Social Security Act. "Since the $30 figure accurately reflects the average necessary expenses, an allowance in that amount should be sufficient in most cases." Defendants' Memorandum Brief, p. 7. We note, however, that several recent Supreme Court decisions seem to require quite strict compliance with federal standards. *See, e.g., California Department of Human Resource Development v. Java,* 91 S. Ct. 1347 (1971); *Rosado v .Wyman,* 397 U.S. 397 (1970); *King v. Smith,* 392 U.S. 309 (1968). The only support for the proposition that a state may "approximately" comply with federal requirements that we can find in the defendants' brief and through our own research is dicta in *Rosado v. Wyman* and in *Amos v. Engleman,* C.A. No. 1340-69 (D.N.J., July 6, 1970). We do not read either case as actually supporting the proposition or helping the defendants' position.

In *Rosado* the Court invalidated a New York law which would have redefined the "standard of need" used to determine eligibility for welfare assistance by replacing itemized grants with a flat grant maximum and eliminat-

ing the "special grant" program. The objection to this law was that it would have reduced the content of New York's standard of need, thus lowering it, which the Court found to be prohibited by § 402(a)(23). This section

> invalidates any state program that substantially alters the content of the standard of need in such a way that it is less than it was prior to the enactment of § 402(a)(23), unless a State can demonstrate that the items formerly included no longer constituted part of the reality of existence for the majority of welfare recipients. We do not, of course, *hold that New York may not,* consistently with the federal statutes, *consolidate items on the basis of statistical averages. . .* Providing all factors in the old equation are accounted for and fairly priced and providing the consolidation on a statistical basis reflects a fair averaging, a State may, of course, consistently with § 402 (a)(23) redefine its method for determining need. . . What is at the heart of this dispute is the elimination of special grants in the New York program, not the system of maximum grants based on average age. (Emphasis added.)

We cannot read this as a carte blanche to the states to reasonably average any and all figures to save administrative costs, as the defendants would apparently like for us to do. The standard of need is defined by the states, and the particular method chosen by the states, provided it does not serve to skirt the reevaluation requirements of § 602(a)(23), does not affect any federal policy. Thus, the use of statistical averages in computing items of need is in *complete* compliance with the requirements of the Social Security Act. The averaging discussed in *Rosado* is legitimate not because *approximate* compliance with the

Act is sufficient, but because this particular method of setting a standard of need is completely consistent with the language and purposes of the Social Security Act.

On the other hand, when Colorado does not take employment expenses in excess of thirty dollars per month into consideration in determining need, it provides a disincentive to all recipients whose work-related expenses exceed or would exceed thirty dollars from seeking or retaining employment. This is in direct opposition to the federal policy contained in § 402(a)(7). For this reason we find the state regulation invalid and hold that the defendants should be enjoined from enforcing such regulation. This same conclusion was reached in *Williford v. Laupheimer,* 311 F. Supp. 720 (E.D. Pa. 1969). *See also, Alameda County v. Carleson,* 97 Cal. Rptr. 385, 488 P.2d 953 (1971).

Apparently, the only other case to consider a provision similar to Colorado's was *Amos v. Engleman, supra.* The court enjoined the enforcement of certain New Jersey provisions as violative of 402(a)(8), but refused to disapprove a $50 flat deduction for expenses reasonably attributable to employment, holding:

> There is nothing in this record to establish that $50 is an unreasonable amount for business expense or that the plaintiffs in this action or the persons they represented have incurred monthly business expenses in excess of $50. We do not consider that it is inconsistent with the statute for a state to use a standard deduction for business expenses in the interest of efficient administration of the program, provided the allowance is adequate to cover all actual expenses. *Id.* at 21.

The court seems to base its decision on the plaintiffs' failure to allege or show actual work expenses in excess of $50. The court indicated that the plaintiffs were not precluded from showing the $50 to be "unreasonable or inadequate." The court also, however, quotes from *Rosado,* and adds, "If a state may use statistical averages to determine the various components of need, it may also do so to compute business expenses." *Id.* at 22. As stated above, we feel this analogy is unsound; therefore, to this extent we may disagree with *Amos v. Engleman.* We would agree, however, that the requirements of the Social Security Act must be "strictly applied" to the states. *Id.* at 17.

We conclude that Section 4313.13 of the Colorado Division of Public Welfare staff manual, Vol. IV, contravenes § 402(a)(7) of the Social Security Act [42 U.S.C. § 602 (a)(7)]. We further conclude that employment expenses under the AFDC program can be standardized only in accordance with § 3140 of the Handbook of Public Assistance Administration. It is therefore

ORDERED that plaintiff's motion for a summary judgment be and the same hereby is granted, and the defendants' motion for a summary judgment be and the same hereby is denied.

Dated at Denver, Colorado, this 13th day of January, 1972.

BY THE COURT:
ALFRED A. ARRAJ
Chief Judge
United States District Court

APPENDIX E

HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION

Part IV 3100-3199

Eligibility and Payments to Individuals—Need—3/11/57

3140. Specific Applications — Income and Resources

1. Employment Expenses

A State public assistance agency may establish a reasonable minimum money amount to represent the combined additional cost of three items — food, clothing, and personal incidentals — for all employed persons. The State plan may provide that other items of work expense will be allowed when there is a determination that such expenses do, in fact, exist in the individual case. On the basis of such a finding in fact of the existence of other expenses related to employment, money amounts for such expenses may be added above the minimum flat amount, provided no duplication of items exists. This method is acceptable, whether the items of work expense are included in a State's standard for requirements, or whether the agency uses the method in arriving at net income in determining resources.

The purpose of this interpretation is to help States simplify administration by eliminating the need for individual case determinations of certain common needs of employed persons. Increased food necessitated by increased activity along with increased clothing and grooming necessitated in holding a job may be standardized and accepted as common needs of all employed persons. The

State agency should be in a position to support the reasonableness of any minimum money amount established for these items within the general framework of its assistance standards and its knowledge and experience with respect to work expenses of recipients.

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APPENDIX F

HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION

Part IV 3100-3199

Eligibility, Assistance, and Services—Need—4/22/64

3140. Specific Applications — Income and Resources

1. Employment Expenses

Sections 2(a)(10), 402(a)(7), 1002(a)(8), 1402(a)(8), and 1602(a)(14) of the Social Security Act require that, in considering income and resources, the State agency shall take into consideration any expenses that are *reasonably attributable* to the earning of any such income. These requirements became effective July 1, 1963, with the exception of title XVI, which is effective with the approval of the State plan. For similar provision applicable in the Community Work and Training Program under title IV, see IV-3462.21 and IV-3463.

Interpretation

The provision for the consideration of expenses of earning income was included in the law to insure that all States will recognize work expenses in determining net income. Also, if work expenses are not considered by a State agency in its plan material, it has the effect of failing to provide an incentive for working since that portion of the family income spent for work expenses has the effect of reducing the amount available for food, clothing, and shelter.

Increased food necessitated by greater activity, along

with the additional clothing and its care, and better grooming necessitated in holding a job, *may be standardized* as accepted, common needs of all employed persons. Therefore, to simplify administration, a State public assistance agency may establish a reasonable money amount to represent the combined additional cost of these three items — food, clothing, and personal incidentals — for all employed persons. The State agency should be in a position to support the reasonableness of any money amount established for these items within the general framework of its assistance standards and its knowledge and experience with respect to work expenses of recipients. This method is acceptable, whether the items of work expenses are included in a State's standard for requirements, or whether the agency uses the method of deduction of work expenses from earned income in arriving at the individual's net income from his employment.

Items of work expenses must be allowed when there is determination that such expenses do, in fact, exist in the individual case. On the basis of a finding of the existence of expenses related to employment, money amounts for such expenses must be added to the individual's needs or deducted from his earned income in such a way as to assure that no duplication of items will exist.

In addition to the increased cost of food, and additional amounts of clothing, care of clothing and personal incidentals, other expenses reasonably attributable to earning income might include:

Special safety or protective clothing items or uniforms and the cost of cleaning or laundering of these special items.

Participation in the "snack break" where it is the custom for that employment.

Transportation to and from work and transportation on job if not reimbursed by the employer.

Contributions to collections for employee benefits, etc., as are found to be necessary in connection with holding the job.

Tools and licenses required for the job.

Dues to unions, business organizations, employee clubs, or similar assessments.

Educational expenses related to employment, including any necessary publications.

Care of child(ren) at home or in day-care facilities, cost of more expensive ready prepared foods for the family when the housewife works.

Special safety devices needed by handicapped people not furnished by the employer.

Requirement for State Plans

Effective July 1, 1963, a State plan under titles I, IV, X, and XIV, and, effective on approval, a State plan under title XVI, must provide that, in determining need, any expenses reasonably attributable to the earning of income will be taken into consideration.

H.T. No. 22

APPENDIX G

DEPARTMENT OF HEALTH,
EDUCATION, AND WELFARE
SOCIAL AND REHABILITATION SERVICE

Washington, D.C. 20201

Assistance Payments
Administration

September 26, 1969
SRS-APA-PS

TO STATE AGENCIES ADMINISTERING
APPROVED PUBLIC ASSISTANCE PLANS

Subject: Conversion Tables for the Application of the Disregard of the First $30 and 1/3 of the Remainder of the Gross Income of AFDC Family

The attached Conversion Tables have been developed for your optional use in cooperation with the National Center for Social Statistics and staff of several Regional Offices as a tool for applying the disregards mandated in Section 402(a)(8)(A)(ii) of the Social Security Act and SRS Program Regulation 20-7 Section 233.20(e) 11 (ii) (b).

Tables have been devised according to weekly, (Column 1), bi-weekly, (Column 2), semi-monthly, (Column 3) and monthly (Column 4) pay periods, whichever is appropriate for the individual cases. The monetary amounts are expressed as gross earnings.

Column 5 represents the amount remaining after the application of the disregard of the first $30 and 1/3 of the

remainder. These amounts have been rounded for $.50 (fifty cents) and over to the nearest dollar. For State agencies which have objectively and equitably identified a standard amount for expenses reasonably attributable to employment, the tables may be further adjusted as demonstrated below,

For example: In a situation where a State agency has an established standard of a $50 per month for all mandatory payroll expenses and all occupational expenses, the attached tables for such a State agency could be adapted to read as follows:

Conversion Tables of Gross Earnings by Frequency of Pay Period. The Application of the Disregard of the First $30 and 1/3 Remainder of AFDC Family Gross Income and Deduction of State Standard of Expenses Reasonably Attributable to the Earnings of One Wage Earner.*

(1) Weekly	(2) Bi-Weekly	(3) Semi-Monthly	(4) Monthly	(5) Net Amount Remaining Less $30 and 1/3 of Expenses of One Wage Earner
Up To:	Up To:	Up To:	Up To:	
24.06 - 24.40	48.12 - 48.80	52.13 - 52.87	104.25 - 105.74	0
24.41 - 24.74	48.81 - 49 49	52.88 - 53.62	105.75 - 107.24	1.00
24.75 - 25 09	49.50 - 50.19	53.69 - 54.37	107.25 - 108.74	2.00
25.10 - 25.44	50.20 - 50.88	54.38 - 55.12	108.75 - 110.24	3.00
25.45 - 25.78	50.89 - 51.57	55.13 - 55.87	110.25 - 111.74	4.00

Methodology for application of the mandated disregard in AFDC (AFDC family eligible in accordance with Section 402(a)(8) (D) of the Social Security Act.)

1. If State agency has opted to disregard not more

(* For each additional wage earner, deduct amount designated by State agency.)

than $5 a month per recipient of any income, deduct this designated amount.

2. Disregard all the earned income of any dependent child who is a full or part-time student who is not a full-time employee.

3. From the remaining gross income of the AFDC family apply the disregard of the first $30 and 1/3 of the remainder.

4. From the remaining amount in 3 above, subtract expenses reasonably attributable to the earning of income for each wage earner (excepting those expenses attributable to the earnings of a dependent child whose income is disregarded in accordance with 2 above).

5. If State agency has opted to provide for conservation of income for future identifiable needs of a child, deduct the applicable amounts.

6. The remainder from 4 and 5 above, whichever is applicable, plus all other available income is subtracted from the amount used by the State to determine need and the amount of the assistance payment.

Determination or redetermination of eligibility for AFDC family who has not been receiving AFDC for any one of the four months preceding the month of the determination.

1. The total AFDC family income, earned and unearned, less only the expenses reasonably attributable to earning of income for each wage earner is to be applied to the appropriate amount used by the State to determine need.

2. If there is a budget deficit without the application of any of the disregards and conservations (that is the disregard of student earned income, first 30 and 1/3 remainder, setting aside for future needs of a child, and the disregard of up to $5 per recipient of any income — Sections 402(a)(8) A (i) & (ii), 402(a)(8)B(i)&(ii) of the Social Security Act, respectively then the method as identified in the above is applicable.

3. If there is no budget deficit, that is the total AFDC family income exceeds the appropriate amount used by the State to determine need, the family is not eligible.

Sincerely,

STEPHEN P. SIMONDS
Commissioner

APPENDIX H

DEPARTMENT OF HEALTH,
EDUCATION, AND WELFARE

Region VIII
Federal Office Building
19th and Stout Streets
Denver, Colorado 80202

May 15, 1972

Social and Rehabilitation
Service

ASSISTANCE PAYMENTS
REGIONAL MEMORANDUM NUMBER 12

Subject: Standard Allowance for Expenses Reasonably Attributable to Earning of Income

To: State Welfare Directors
Region VIII

1. The 1962 Amendments to the Social Security Act amended the Act to provide that in determining need the State agency shall take into consideration any expenses reasonably attributable to the earning of any such income. Welfare Administration, Bureau of Family Services, State Letter No. 674 attached the publication titled "Public Assistance 1962." It states as follows: "Other work incentives were offered through provisions that . . . require taking into account necessary expenses that can be reasonably attributable to the earning of income in determining need under all the Federally aided assistance programs."

2. In accordance with 45 CFR 233.20(a)(3)(iv), a

State plan must provide that income equal to expenses reasonably attributable to the earning of income will not be included as income. Under 45 CFR 233.20(a)(6)(iv), earned income means the total amount, irrespective of personal expenses, such as income tax deductions, lunches and transportation to and from work, and irrespective of expenses of employment which are not personal, such as the cost of tools, materials, special uniforms, or transportation to call on customers. 45 CFR 233.20(a)(7)(i) also requires the plan to provide as part of the method for disregarding earned income, that all work expenses, personal and non-personal, will be deducted. SRS unnumbered State Letter of September 26, 1969, recognizes that "for State agencies which have objectively and equitably identified a standard amount for expenses reasonably attributable to employment, the tables (for use in applying the disregard) may be further adjusted as demonstrated below."

3. Accordingly, it is clear under the Federal policy that State agencies must, as a minimum, consider those items of work expenses identified in 45 CFR 233.20(a)(6)(iv), namely, mandatory payroll deductions, lunches, transportation to and from work, tools, materials and special uniforms and child care costs incurred because of the employment.

4. HEW has accepted State proposals to use a flat amount for expenses attributable to earning of income (other than child care expenses), *where there has been a factual justification of the reasonableness of the flat amount,* as being consistent with the Federal requirements for simple and efficient program administration, and as resulting in an equitable and uniformly administered program. This is also consonant with the requirement in 45

CFR 233.20(a)(1) that States determine need and the amount of assistance for all applicants and recipients on an objective and equitable basis.

5. *Individualization of expenses is also acceptable under Federal policy. The use of a justified flat amount for some items, rather than all items, is also acceptable.* For example, State agencies have developed justified flat amounts for all expenses other than mandatory payroll deductions and child care (which costs are recognized on an indivdual basis). There are other intermediate combinations. Individualization of expenses up to *a maximum is not acceptable,* because most recipients would not be treated equitably and uniformly under such a method.

JOHN P. SKILLERN
Acting Associate
Regional Commissioner
Assistance Payments